Supreme Court, U.S.
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No. 95-1888

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROGER GIMBEL, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment requires an articulable suspicion of individualized wrongdoing before a court can enforce a Federal Deposit Insurance Corporation subpoena seeking personal financial records from the former director of a failed bank.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 77 F.3d 593. The order of the district court (Pet. App. 24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1996. The petition for a writ of certiorari was filed on May 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver of the First New York Bank for Business (FNYBB) after it failed. Pet. App. 3a. In 1995, the FDIC issued an order of investi-

gation of FNYBB's former officers and directors. Pet. 4. The purposes of the investigation are to determine: (1) whether claims exist against FNYBB's former directors as a result of any actions or failures to act with respect to the institution; (2) whether pursuit of such claims would be cost effective; (3) whether the FDIC should seek to avoid any asset transfers made by those persons; and (4) whether the FDIC should seek to attach the assets of those persons. Pet. 3-4.

2. Acting pursuant to the order of investigation and its statutory authority to issue subpoenas, see 12 U.S.C. 1821(d)(2)(I)(i), 1818(n), the FDIC issued a subpoena *duces tecum* to petitioner, former FNYBB director Roger Gimbel, seeking records relating to his financial interests. Pet. 3-4. Petitioner moved to quash the subpoena, and the FDIC cross-moved for summary enforcement of the subpoena. *Ibid.* In support of its motion, the FDIC submitted the declaration of an FDIC investigator which stated that FNYBB had sustained significant losses resulting from insider loans and that the extent and nature of those losses suggested that the directors, including petitioner, were grossly negligent and had violated their fiduciary duty of loyalty to FNYBB by approving and/or ratifying the insider loans. Pet. App. 18a-19a.

3. The district court denied petitioner's motion to quash and granted the FDIC's cross-motion for summary enforcement. Pet. App. 24a. The district court found that the FDIC had "made an adequate showing that it has a reasonable basis for its determination that [petitioner] may be liable to the bank of which he was a director." *Ibid.* Relying on the Second Circuit's decision in *In re McVane*, 44 F.3d 1127 (1995),

the district court found that showing sufficient to support the FDIC's subpoena. Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court applied the standard set forth in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), for assessing the constitutionality under the Fourth Amendment of an administrative subpoena. Pet. App. 7a. That standard requires that the subpoenaed information be "reasonably relevant [to the agency investigation]," "not too indefinite," and "within the authority of the agency"; an agency need not establish probable cause in order to support the subpoena. *Ibid.* (quoting *Morton Salt*, 338 U.S. at 652).

The court of appeals rejected petitioner's contention that the *Morton Salt* standard applies only to corporate, and not to personal, records. Pet. App. 8a-16a. The court noted that, although corporations are not entitled to the same level of Fourth Amendment protection as are individuals, courts have applied the *Morton Salt* standard to subpoenas for personal financial records. *Id.* at 11a (citing *McVane*, 44 F.3d at 1137; *RTC* v. *Walde*, 18 F.3d 943, 946-948 (D.C. Cir. 1994); *SEC* v. *Kaplan*, 397 F. Supp. 564, 567, 570 (E.D.N.Y. 1975)). It further observed that this Court applied the *Morton Salt* standard to the enforcement of an IRS subpoena of a taxpayer's personal financial records in *Ryan* v. *United States*, 379 U.S. 61 (1964). The court of appeals reasoned that the rationale for affording corporations less Fourth Amendment protection than is accorded to individuals is that corporations, as creatures of the State, have limited grounds for a "reasonable expectation of privacy." Pet. App. 13a. The court of appeals found that bank directors, as participants in an intensely regulated industry, can claim no "expectation of privacy of a level

demanding a standard more demanding than the *Morton Salt* standard." *Id.* at 16a. The court accordingly concluded that, "[a]bsent circumstances not present in this case, the Fourth Amendment requires no showing beyond, the standard articulated in *Morton Salt* where the FDIC seeks the personal financial records of a director of a failed bank." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 6-13) that the court of appeals erred in applying the standard set forth in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), to assess the constitutionality of an administrative subpoena of personal financial records. He argues (Pet. 9) that the FDIC must establish an articulable suspicion of individualized wrongdoing to support an administrative subpoena for personal financial records.

In *Morton Salt*, the Court upheld an administrative subpoena of corporate records issued by the Federal Trade Commission and held that such a subpoena is constitutional under the Fourth Amendment if the underlying investigation "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 652. A passage in *Morton Salt* states that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Ibid.* As the court of appeals concluded, however, this Court's decision in *Ryan* v. *United States*, 379 U.S. 61 (1964), which applied the *Morton Salt* standard to an Internal Revenue Service (IRS) summons to produce personal financial records, establishes that the *Morton Salt* standard is not limited to corporate records. In

Ryan, the Court enforced an IRS summons of a taxpayer's personal financial records for the reasons stated in *United States* v. *Powell*, 379 U.S. 48 (1964). *Ryan*, 379 U.S. at 62. *Powell*, 379 U.S. at 57-58, in turn, applied the *Morton Salt* standard to an IRS summons of corporate financial records. Consistent with the Court's decision in *Ryan*, the lower courts have applied *Morton Salt*'s reasonable relevance test to administrative subpoena of personal financial records. Pet. App. 11a; *FDIC* v. *Wentz*, 55 F.3d 905, 908 (3d Cir. 1995); *In re McVane*, 44 F.3d 1127, 1137 (2d Cir. 1995); *RTC* v. *Walde*, 18 F.3d 943, 946-948 (D.C. Cir. 1994); *Sandsend Fin. Consultants, Ltd.* v. *FHLBB*, 878 F.2d 875, 878 (5th Cir. 1989).

Petitioner attempts (Pet. 10-12) to distinguish the IRS's summons authority from the FDIC's subpoena power. He argues that the IRS has a greater need for personal records than the FDIC, and that individual taxpayers have a lower expectation of privacy in their personal financial records than the former directors of failed federally insured financial institutions. Neither argument is persuasive. Congress placed no greater restrictions on the FDIC's subpoena power than on the IRS's summons authority,* indicating

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* The Secretary of the Treasury is authorized "[f]or the purpose of ascertaining the correctness of any return" to require the "produc[tion of] such books, papers, records, or other data * * * as may be relevant or material to such inquiry." 26 U.S.C. 7602(a). The Secretary was so empowered at the time that *Ryan* was decided. See *United States* v. *Ryan*, 320 F.2d 500, 501-502 (6th Cir. 1963) (quoting 1958 version of Section 7602), aff'd, 379 U.S. 61 (1964). The FDIC in its capacity as receiver is empowered, "for purposes of carrying out any power, authority, or duty with respect to an insured depository institution," to "exercise any power established

that Congress believed that the agencies have similar needs to obtain information within their respective areas of responsibility. The court of appeals also correctly concluded that bank directors, as participants in a highly regulated industry, have no greater expectation of privacy in their personal financial records than taxpayers. Pet. App. 15a (citing *Vernonia School Dist. 47J* v. *Acton*, 115 S. Ct. 2386, 2393 (1995) ("adults who choose to participate in a 'closely regulated industry' * * * have reason to expect intrusions upon normal rights and privileges, including privacy")).

2. Petitioner also contends (Pet. 13-18) that the Court should grant certiorari to resolve "confusion" in the lower courts regarding the constitutional standard applicable to the enforcement of FDIC subpoenas for personal financial records. There is no conflict among the circuits on that issue. In *Parks* v. *FDIC*, No. 94-2262, 1995 WL 529629 (Sept. 13, 1995), a divided panel of the First Circuit held that the *Morton Salt* standard does not apply to an administrative subpoena for personal financial records, and that such a subpoena must be supported by "individualized suspicion of wrongdoing by the target of the subpoena." *Id.* at *7. That decision, however, was withdrawn and rehearing en banc was granted. Pet. 16. On rehearing, the case was dismissed on motion of the parties "on the grounds of changed circumstances." Pet. 16 n.7. The courts of appeals that have addressed the issue are in agreement that the *Morton Salt* standard applies to administrative subpoenas of personal finan-

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under section 1818(n) of this title." 12 U.S.C. 1821(d)(2)(I)(i). Section 1818(n) grants the power to issue subpoenas. 12 U.S.C. 1818(n).

cial records. See *FDIC* v. *Wentz*, 55 F.3d 905 (3d Cir. 1995); *In re McVane*, 44 F.3d 1127 (2d Cir. 1995); *RTC* v. *Walde*, 18 F.3d 943 (D.C. Cir. 1994); *In re Sealed Case*, 42 F.3d 1412 (D.C. Cir. 1994). In applying the *Morton Salt* standard, the circuits have agreed that the FDIC and similarly empowered agencies have statutory authority to subpoena personal financial information for the purposes of determining liability and identifying avoidable asset transfers and attachable assets without establishing an articulable suspicion of wrongdoing. See *Walde*, 18 F.3d at 947-948; *McVane*, 44 F.3d at 1136; *Wentz*, 55 F.3d at 909; see also 12 U.S.C. 1821(d)(17), 1821(k) (FDIC in its capacity as receiver has power to avoid fraudulent asset transfers and to assert claims against an insured institution's directors and officers). No court of appeals has held otherwise.

Even if there were a question as to whether the FDIC must establish an articulable suspicion of individual wrongdoing to support an administrative subpoena of personal financial records, that question is not presented in this case, because the court of appeals found that the FDIC made such a showing. In *McVane*, the Second Circuit concluded that the FDIC lacks statutory authority to subpoena personal financial records solely for the purposes of determining whether litigation would be cost-effective, unless the agency "articulate[s] specific grounds for its suspicion of liability." 44 F.3d at 1139-1140; see also *Walde*, 18 F.3d at 947-948; cf. *Wentz*, 55 F.3d at 909 (reserving the question). The FDIC in this case identified determining cost-effectiveness as one of the purposes of its subpoena. Pet. App. 18a. The court of appeals considered whether the FDIC had "articu-

late[d] specific grounds for its suspicion of liability," and concluded that it had. *Id.* at 22a-23a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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